No. 23-21

In the
Supreme Court of the United States

STUART R. HARROW,

Petitioner,

v.

DEPARTMENT OF DEFENSE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE FEDERAL CIRCUIT BAR ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Federal Circuit Bar Association (FCBA) is a national organization for the bar of the United States Court of Appeals for the Federal Circuit. Started in 1985, the FCBA unites different groups across the nation that practice before the Federal Circuit. The FCBA facilitates *pro bono* representation for claimants such as veterans, patent applicants, and government employees who have potential or active litigation in the Federal Circuit's jurisdiction, with a view to strengthening the litigation process at that court. This includes representation for Merit Systems Protection Board (MSPB) claimants, either at the agency or on appeal to the Federal Circuit. Federal Circuit precedent treating certain deadlines as jurisdictional affects the FCBA's ability to provide meaningful representation for those claimants.

Because the Respondent is part of the federal government, FCBA members and leaders who are federal government employees have not participated in the FCBA's decision whether to participate as an amicus, or in preparation of this brief.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Court should hold that 5 U.S.C. § 7703(b)(1)(A)'s 60-day deadline to appeal from the MSPB to the Federal Circuit is a claim-processing rule, not a jurisdictional requirement. In addition to the points in Petitioner's brief, three further considerations favor that result.

First, treating the filing deadline as jurisdictional would be inconsistent with the MSPB adjudication process and unfair to many litigants. In contrast to district-court litigation, MSPB proceedings are relatively informal and claimant-friendly. Statutes and regulations establish flexible deadlines, informal rules, appellant-friendly burdens of proof, and asymmetric appeal rights. Consistent with the legal structure of the process, approximately half of MSPB appellants are *pro se*, and many others proceed with non-attorney representatives. Here, as in cases like *Zipes* and *Henderson*, treating the filing deadline as jurisdictional would clash with the statutory scheme and be ill-suited to a largely *pro se*-driven process. It would also be especially unfair to those *pro se* litigants who miss their appeal deadlines by *de minimis* amounts of time, for reasons attributable to the government.

Second, 28 U.S.C. § 1295(a)'s text and structure reflect the unique nature of the Federal Circuit's jurisdiction. The numerous cross-references in section 1295(a)'s fourteen subsections reflect only Congress' intent to state *which* cases may come to the Federal Circuit. The Court should not hold—explicitly or implicitly—that any deadlines contained in the

numerous cross-referenced statutes are now jurisdictional.

Third, the Court should reject the government's suggestion that appellate courts are unsuited to consider factual or evidentiary questions associated with equitable tolling. *Henderson* rejects that argument. And courts of appeals can, and often do, analyze facts and evidence in the first instance when necessary to resolve threshold issues such as standing, mootness, or tolling. Examples abound from the Federal and D.C. Circuits, and refute any suggestion that equitable tolling is somehow beyond an appellate court's competence.

ARGUMENT

I. Treating the Appeal Deadline As Jurisdictional Would Be Inconsistent With the Statutory Scheme and Unfair to MSPB Appellants, Who Are Mostly *Pro Se*.

1. This Court's precedent recognizes that "technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972). *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397-98 (1982) applied that "guiding principle" to rule that a Title VII filing deadline was not jurisdictional.

In *Henderson v. Shinseki*, 562 U.S. 428, 440-41 (2011), this Court applied similar reasoning to hold that the deadline to appeal to the Court of Appeals for Veterans Claims (Veterans Court) is not jurisdictional. The veterans claims system is informal, non-adversarial, and pro-claimant in ways that "contrast … dramatic[ally]" with "ordinary civil

litigation." *Id.* at 440. Among other things, the statutory scheme requires the VA to assist the veteran in developing his claims, and provides asymmetric appeal rights to the Veterans Court. *Id.* at 440-41. The veteran may appeal an adverse decision, but the VA may not. *Id.* at 441. *Henderson* surveyed these and other features of the veterans claims system, and concluded that "[r]igid jurisdictional treatment of the 120-day period for filing a notice of appeal in the Veterans Court would clash sharply with this scheme." *Id.* That was so, even though proceedings at the Veterans Court itself are formal and adversarial. *Id.* at 432-33; *see also, e.g.*, 38 U.S.C. §§ 7263 (VA represented by general counsel at the Veterans Court), 7264 (Veterans Court proceedings follow formal rules).

Zipes and *Henderson* support reversal here. As in *Zipes*, the deadline here is embedded within "a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." Around two million federal employees have the right to appeal to the MSPB from adverse employment actions by government agencies. *See* MSPB, *Jurisdiction*, *available at* https://tinyurl.com/36zdzkdp. "[A]bout 50% of appeals filed with the agency are from *pro se* appellants—employees representing themselves." MSPB, *Congressional Budget Justification FY 2022* at 18 (May 2021), *available at* https://tinyurl.com/5e53mxs2. That does not mean the remaining 50% have lawyers. MSPB appellants may "be represented by an attorney *or other representative*." 5 U.S.C. § 7701(a)(2) (emphasis added). *Any* person may be a "representative" "as long as that person is willing and available to serve." 5 C.F.R. § 1201.31(b); *see also*

MSPB, *Judges' Handbook*, at 11 (Oct. 2019) ("A party may choose any representative who is willing and available to serve…"), *available at* https://tinyurl.com/wmu7frwy.

As in *Henderson*, rigid treatment of the deadline to appeal from the MSPB would "clash sharply" with the statutory scheme. As Petitioner explains (at 3-5, 20-21), and this brief will not recapitulate, MSPB procedures are relatively informal and reflect solicitude for federal employees—including by requiring detailed notifications to employees of their rights; by treating deadlines as flexible, waivable, or excusable for good cause; and by placing the burden of proof on the agency to show that its actions were lawful. In addition to features Petitioner identifies, other regulations underscore the informal, claimant-friendly nature of the process.[2] And similar to the scheme the Court considered in *Henderson*, the statute provides asymmetric appeal rights. "*Any* employee or applicant … adversely affected or aggrieved by a final order or decision … may obtain

[2] *E.g.*, 5 C.F.R. § 1201.24(a) (allowing an appeal to "be in any format, including letter form"), (b) (allowing an employee to raise a claim or defense during the initial MSPB conference even if he did not raise it in his appeal, and to raise a new claim after the conference for good cause); *id.* § 1201.56(d) (requiring AJs to inform the parties of the burdens of proof for the few issues for which the employee bears the burden); *id.* § 1201.111(c) (Board decision ordering interim relief must give employee specific notice that he is entitled to relief, even if the government petitions for review of the decision); *id.* § 1201.116(a) (requiring agency to certify that it has provided employee any requisite interim relief if it petitions for review), (d) (employee may request dismissal of a petition for review if agency has not provided required interim relief).

judicial review" as of right. 5 U.S.C. § 7703(a)(1) (emphasis added). But the government may only obtain judicial review if OPM's Director determines that the MSPB decision misinterpreted a legal provision "affecting personnel management" and "will have a substantial impact on a civil service" law or policy. *Id.* § 7703(d)(1), (2). And whether to hear a petition for review by the government is ultimately "at the discretion of the [c]ourt of [a]ppeals," rather than of right. *Id.*

2. Harsh jurisdictional treatment of Section 7703(b)(1)(A)'s deadline would not only clash with the statutory scheme; it would be particularly unfair here. Many *pro se* appellants to the Federal Circuit miss their deadlines by *de minimis* amounts, and for reasons that are either attributable to the government or that would be unreasonable to hold against *pro se* appellants. If the deadline here were not jurisdictional, the Federal Circuit would at least have the latitude to permit the government to acquiesce to or waive *de minimis* objections to untimeliness. Or it could consider the government's responsibility for the delay, consistent with equitable tolling principles. Equitable tolling protects the plaintiff who "has not slept on his rights, but … has been prevented from asserting them." *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 429 (1965). And it vindicates the principle that defendants should not escape liability by preventing the plaintiff from meeting a filing deadline. *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987); *cf. Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-33 (1959).

One way the government often contributes to MSPB appellants missing their filing deadlines is through mailing delays. In part because the Federal Circuit construes 5 U.S.C. § 7703(b)(1)(A) to impose a deadline for receipt by the court rather than a mailbox rule, it frequently happens that *pro se* appellants mail their petitions to the Federal Circuit before the deadline, but miss the deadline by a week or less, and have their appeals dismissed *sua sponte*.[3]

Ironically, the United States Postal Service is a frequent respondent in MSPB appeals, and sometimes the beneficiary of its own delays in delivering petitions to the Federal Circuit. In *Obiedzinski v. USPS*, No. 17-1375, ECF #9 (Fed. Cir. Mar. 9, 2017), a *pro se*

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[3] *See Casillas v. Dep't of Veterans Affs.*, No. 22-2264, ECF #13 (Fed. Cir. Feb. 16, 2023) (*pro se* appellant); *Edwards v. OPM*, No. 22-2245, ECF #12 (Fed. Cir. Mar. 27, 2023) (*pro se* appellant); *Hobson v. Dep't of Def.*, No. 23-1258, ECF #17 (Fed. Cir. Apr. 21, 2023) (*pro se* appellant; petition for review mailed, but delivered two days late); *Jolley v. HUD*, No. 22-2061, ECF#31 (Fed. Cir. June 7, 2023) (*pro se* appellant; petition for review mailed, but delivered one day late); *Baker v. MSPB*, No. 23-1585, ECF #9 (Fed. Cir. July 6, 2023) (*pro se* appellant); *Kitlinski v. DOJ*, No. 23-1961, ECF #14 (Fed. Cir. July 10, 2023) (*pro se* appellant; petition for review mailed, but delivered two days late); *Chaudhuri v. Dep't of Veterans Affs.*, No. 23-1890, ECF #13 (Fed. Cir. Oct. 19, 2023) (*pro se* appellant; petition for review sent via first-class mail, but delivered seven days late; tracking demonstrates USPS took eleven days to deliver petition from Texas to Washington, D.C.); *Chowdhury v. MSPB*, No. 23-1973, ECF #19 (Fed. Cir. Oct. 23, 2023) (*pro se* appellant); *Freeman v. OPM*, No. 23-2000, ECF #15 (Fed. Cir. Oct. 30, 2023) (*pro se* appellant; petition for review mailed, but delivered three days late); *Jones v. MSPB*, No. 23-1703, ECF #21 (Fed. Cir. Nov. 6, 2023) (*pro se* appellant; petition for review mailed, but delivered three days late).

appellant proceeding against the Postal Service mailed his petition seven days before the deadline, but had his appeal dismissed because the Postal Service did not deliver it until ten days later. *See also, e.g.*, *Brenndoerfer v. USPS*, 693 F. App'x 904 (Fed. Cir. 2017) (similar). Even an appellant who used express mail, eight days before the appeal deadline, was unable to escape the same fate. *Swartwout v. OPM*, No. 17-1522, ECF #12 (Fed. Cir. July 21, 2017). And just last year, a *pro se* appellant showed, with tracking information, that he mailed his petition three days before the deadline via first class mail, but the Postal Service took eleven days to deliver it to Washington, D.C. *Chaudhuri v. Dep't of Veterans Affs.*, No. 23-1890, ECF #11 (Fed. Cir. July 13, 2023); *see also Jolley v. HUD*, No. 22-2061, ECF #31 (Fed. Cir. June 7, 2023) (at the time of mailing, Postal Service estimated a timely delivery date, but ultimately delivered the petition one day late).

This case appears to involve another instance of inordinate government delay contributing to a *pro se* appellant missing his deadline. While Petitioner's request for full Board review was pending in 2017, the MSPB lost its quorum and was unable to issue decisions until March 2022. MSPB, *Lack of Quorum and the Inherited Inventory: Chart of Cases Decided and Cases Pending*, *available at* http://tinyurl.com/2ed7p75k. After five years of silence, the MSPB issued a decision out of the blue and relied on its e-mail system to alert Petitioner to the result. Whatever might be said about a professional attorney's duty in ordinary civil litigation to update contact information and monitor a dormant docket for five years—it is unlikely that Congress intended the *pro se* appellants

at the MSPB to suffer the automatic, case-ending consequences imposed here.

II. The Court Should Not Treat 28 U.S.C. § 1295's Numerous Cross-References to Other Statutes As Clear Statements from Congress That the Associated Deadlines Are Jurisdictional.

28 U.S.C. § 1295(a)(9) states that the "Federal Circuit shall have exclusive jurisdiction— … of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5."

The government and the Federal Circuit have contended that because 1295(a) is a jurisdictional statute, the simple cross-reference to section 7703(b)(1) is a "clear statement" that section 7703(b)(1)(A)'s filing deadline is jurisdictional. *See* BIO 10 ("[T]he time bar is jurisdictional because it is linked to Section 1295(a)(9)'s grant of jurisdiction by an express cross-reference" (cleaned up)); *Fed. Educ. Ass'n—Stateside Region v. Dep't of Def., Domestic Dependents Elementary & Secondary Schs.*, 898 F.3d 1222, 1225-26 (Fed. Cir. 2018), *reh'g denied*, 909 F.3d 1141 (Fed. Cir. 2019), *cert. denied* 139 S. Ct. 2616 [hereinafter *Graviss*]. Petitioner's opening brief explains the main problems with that argument, predominantly relying on the text of sections 1295(a)(9) and 7703(b)(1)(A) (at 11-20).

Another reason to reject the government's cross-reference argument is that incorporating section 7703(b)(1)(A)'s deadline into section 1295's jurisdictional grant runs counter to the broader context of section 1295(a) and the Federal Circuit's

unique jurisdiction. Congress created the Federal Circuit in 1982 by merging and altering the Court of Claims and the Court of Customs and Patent Appeals. *South Corp. v. United States*, 690 F.2d 1368, 1369 (Fed. Cir. 1982) (en banc). To bring uniformity to patent law, Congress gave the Federal Circuit exclusive appellate jurisdiction over most patent cases, including district court appeals that had previously gone to the regional circuits. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 390 (1996). But to prevent the Federal Circuit from becoming too isolated or specialized, Congress also assigned it jurisdiction over orders from a complex and diverse collection of tribunals. *See* Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. Rev. 1, 3 (1989). Today, the Federal Circuit's jurisdiction includes review of agencies' boards of contract appeals,[4] the Office of Compliance,[5] the Government Accountability Office Personnel Appeals Board,[6] the Court of Appeals for Veterans Claims,[7] the Court of Federal Claims,[8]

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[4] 28 U.S.C. § 1295(a)(10) (jurisdiction); 41 U.S.C. § 7107(a) (filing deadline).

[5] 2 U.S.C. § 1407(a) (jurisdiction), (b)(1) (filing deadline).

[6] 31 U.S.C. § 755 (jurisdiction and filing deadline).

[7] 38 U.S.C. § 7292(c), (d) (jurisdiction); *id.* § 7292(a) ("within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts").

[8] 28 U.S.C. § 1295(a)(3) (jurisdiction); Ct. Fed. Cl. R. 58.1 ("within the time and in the manner prescribed for appeals in [Fed. R. App. P. 3]"); 42 U.S.C. §§ 300aa-12(f), 300aa-21(a) (jurisdiction and filing deadline for Vaccine Act appeals).

the Patent Trial and Appeal Board,[9] the Trademark Trial and Appeal Board,[10] the Court of International Trade,[11] and the International Trade Commission.[12] Individual tribunals' statutory schemes are scattered throughout the U.S. Code, and include provisions for appealing to the Federal Circuit. *See, e.g.*, 35 U.S.C. §§ 141-144 (Patent Office appeals); 19 U.S.C. § 1337(c) (International Trade Commission).

28 U.S.C. § 1295(a) contains fourteen subsections, and numerous cross-references to other statutes. Section 1295(a)'s subsections mainly collect and list which appeals of which decisions from which tribunals the Federal Circuit may hear, using a "mélange of phrasing." *Graviss*, 898 F.3d at 1230 (Plager, J., dissenting). As Judge Plager explained in dissent in *Graviss*, the "clear … purpose of § 1295(a) is to state *which* cases come to the Federal Circuit, not *when* they may come." *Id.* at 1230 (Plager, J., dissenting). Closer examination of the individual appeal deadlines under this Court's precedents may reveal which ones Congress clearly intended to have jurisdictional consequences. But the Court should not hold or imply that a mere cross-reference in 28 U.S.C. § 1295(a), by itself, is a clear statement to that effect.

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[9] 28 U.S.C. § 1295(a)(4)(A).

[10] 28 U.S.C. § 1295(a)(4)(B) (jurisdiction); 37 C.F.R. § 2.145(d)(1) (filing deadline); *see also* 15 U.S.C. § 1071(a).

[11] 28 U.S.C. §§ 1295(a)(5) (jurisdiction), 2645(c) (same deadline as "for appeals … from the United States district courts.").

[12] 28 U.S.C. § 1295(a)(6) (jurisdiction); 19 U.S.C. § 1337(c) (deadline).

III. Courts of Appeals Can Evaluate Tolling Arguments, Even When the Arguments Implicate Facts or Evidence.

The government's brief opposing certiorari includes the argument that § 7703(b)(1)(A)'s deadline should be jurisdictional because courts of appeals may find it "more cumbersome" than district courts "to conduct the fact-intensive inquiries that equitable tolling requires." BIO 13-14, 18. The government is wrong. Courts of appeals can, and often do, analyze facts and evidence in the first instance when necessary to resolve threshold issues such as standing, mootness, or tolling.

A common example is Article III standing in administrative appeals. Administrative agencies are not subject to Article III, so there is generally no need for participants in agency proceedings to establish their standing, or for the agency to consider standing. But when a petitioner seeks judicial review in a court of appeals, "the constitutional requirement [of] standing kicks in." *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002). If standing is not self-evident, "the petitioner must substantiate its standing," by "submit[ting] additional evidence to the court of appeals" if necessary. *Id.; see also id.* at 900-01. In those cases, the court of appeals unavoidably weighs evidence and assesses facts, as part of its "special obligation to satisfy itself … of its own jurisdiction." *Bender v. Williamsport Areas Sch. Dist.*, 475 U.S. 534, 541 (1986).

The Federal Circuit is no stranger to that scenario. It hears hundreds of appeals each year from *inter partes* reviews challenging the validity of patents at

the Patent Trial and Appeal Board. *Any* "person" other than the patent owner can initiate proceedings. 35 U.S.C. § 311(a). The challenger "need not have a concrete stake in the outcome; indeed, they may lack constitutional standing." *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 279 (2016). Any "party dissatisfied with" the final decision can appeal. 35 U.S.C. § 319. A patent challenger's standing to appeal an adverse decision is often self-evident—*e.g.*, if the challenger is also the defendant in an infringement lawsuit. But if standing is not self-evident, the Federal Circuit must often assess facts and evidence in the first instance. The Federal Circuit has considered evidence on subjects such as the appellant's investments, plans, and progress toward developing potentially infringing products,[13] the appellant's competitive relationship with the patent owner,[14] and specific terms of patent licenses between the challenger and patent owner.[15]

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[13] *E.g.*, *Argentum Pharms. LLC v. Novartis Pharms. Corp.*, 956 F.3d 1374, 1377-78 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 1685 (2021); *Momenta Pharms., Inc. v. Bristol-Myers Squibb Co.*, 915 F.3d 764, 769-70 (Fed. Cir. 2019); *JTEKT Corp. v. GKN Auto. LTD.*, 898 F.3d 1217, 1220-21 (Fed. Cir. 2018), *cert. denied*, 139 S. Ct. 2713 (2019).

[14] *E.g.*, *Gen. Elec. Co. v. United Techs. Corp.*, 928 F.3d 1349, 1353-55 (Fed. Cir. 2019), *cert. denied*, 140 S. Ct. 2820 (2020); *AVX Corp. v. Presidio Components, Inc.*, 923 F.3d 1357, 1365-67 (Fed. Cir. 2019).

[15] *ModernaTx, Inc. v. Arbutus Biopharm. Corp.*, 18 F.4th 1352, 1359-62 (Fed. Cir. 2021); *Apple Inc. v. Qualcomm Inc.*, 992 F.3d 1378, 1381-85 (Fed. Cir. 2021), *cert. denied*, 142 S. Ct. 2868 (2022); *Samsung Elecs. Co. v. Infobridge Pte. Ltd.*, 929 F.3d 1363, 1368 (Fed. Cir. 2019).

The Federal Circuit's standing decisions draw from D.C. Circuit precedent. *E.g.*, *Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168, 1173 (Fed. Cir. 2017) (discussing D.C. Circuit *Sierra Club* case). The D.C. Circuit has decades of experience considering evidence of an appellant's standing to challenge agency action. The D.C. Circuit's 2002 *Sierra Club* decision details procedures for substantiating standing in agency appeals. And the court has adopted Circuit Rules and forms specifically for that purpose. *E.g.*, D.C. Cir. R. 15(c)(2) (docketing statement), 28(a)(7) (required section of briefs).

Another example is mootness. When it appears that a case may have become moot on appeal, appellate courts (including this Court) must often accept and review new facts and evidence. *E.g.*, *Acheson Hotels, LLC v. Laufer*, 144 S. Ct. 18 (2023); *Norwegian Cruise Line Holdings Ltd. v. State Surgeon Gen.*, 55 F.4th 1312, 1314-15 (11th Cir. 2022).

Equitable tolling is no more complicated, "fact-intensive" or "cumbersome," BIO 13, 18, than standing or mootness. The litigant must show "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 255 (2016). That inquiry is well within the competence of a court of appeals.

The government's contrary suggestion, taken to its logical conclusion, would make all appeal deadlines presumptively jurisdictional. That result would contravene this Court's precedent. *See Henderson*, 562 U.S. at 431 (holding that the deadline to appeal a

decision to the United States Court of Appeals for Veterans Claims is not jurisdictional). It would also muddy this Court's otherwise-clear rule for filing deadlines.

CONCLUSION

The Court should hold that 5 U.S.C. § 7703(b)(1)(A)'s 60-day deadline to appeal from the MSPB to the Federal Circuit is a claim-processing rule, not a jurisdictional requirement.

Respectfully submitted,

January 18, 2024

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